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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO SANDOVAL and
FELIPE SANDOVAL,

Defendants and Appellants.

2d Crim. No. B287335
(Super. Ct. No. NA104709-01,02)
(Los Angeles County)

Fernando Sandoval and his brother Felipe Sandoval appeal from the judgments after they were convicted by jury of assault with a firearm (count 2; Pen. Code, § 245, subd. (a)(2))¹ with a gang enhancement (§ 186.22, subd. (b)(1)(B)). The jury found that Felipe personally used a firearm in the assault (§ 12022.5, subd. (b)) and also convicted Felipe of carrying a loaded, unregistered handgun (count 3; § 25850, subd. (a)) with a gang enhancement (§ 186.22, subd. (b)(1)(B)). The trial court

¹ All further statutory references are to the Penal Code.

sentenced Fernando to three years state prison and sentenced Felipe to six years state prison.

Felipe contends that the evidence does not support the conviction because his revolver was loaded with the wrong ammunition and he had no present ability to inflict serious injury on the assault victim. Fernando claims the trial court abused its discretion in denying his *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) and *Faretta* (*Faretta v. California* (1975) 422 U.S. 806) motions. We affirm.

Facts and Procedural History

On July 30, 2016, Jesus Cervantes was shot in the city of Wilmington, in West Side Wilmas gang territory. Cervantes was affiliated with the East Side Longos gang and Felipe's close friend.

The day after the shooting Felipe drove Fernando to an apartment building in Wilmington. Fernando got out of the Ford Explorer and approached Israel Samano, Erika Monjaraz, and their two children. Fernando held a semiautomatic handgun in his hoddie pocket and asked if they were "Wilmeros." Samano replied, "We're not gang members' 'Respect, man, there are kids here.'" Fernando said "I don't give a fuck about your kids. . . . My homie got shot. Fuck Wilmas. . . . We're Eastside Longo[s]." "Someone has to pay."

Felipe wore a green construction vest with reflective tape. He stayed in the Ford Explorer and pointed a handgun at the group. After Felipe and Fernando drove away, Samano called 911 and reported that two men from the East Side Longos were driving a green Ford Explorer and that one of them pulled a gun on Samano and his family. Samano said that both men had guns and that he got a partial license plate number.

On August 3, 2016, Los Angeles Police detectives executed a warrant to search Felipe's apartment and found an unregistered and loaded .32 caliber revolver wrapped in a green traffic vest, a leather holster, a photo of Cervantes, the keys to a green Ford Explorer, and a box of mixed .32 caliber ammunition. Some of the bullets were designed for use in an semi-automatic weapon (.32 auto ammunition). Another .32 caliber bullet was in the Ford Explorer glove box.

In a *Miranda* interview (*Miranda v. Arizona* (1966) 384 U.S. 436), Felipe told Detective Brian Williams that "west side" gang members shot Cervantes and that Cervantes was his "homie." In a non-recorded portion of the interview, Felipe admitted that his revolver was loaded and on the car console next to him the day of the Samano assault. Felipe said that he tried to shoot the revolver a few weeks before the assault but it did not fire.

Detective Williams testified that the revolver cylinder rotated and "[i]t's a fully functioning real firearm with live ammunition . . . inside of it." On cross-examination, the detective was asked about the box of mixed .32 caliber ammunition. Detective Williams stated that .32 caliber auto and .32 caliber ammunition are "designed distinctly different" but "it's possible" to fire .32 caliber auto ammunition in a revolver.

Present Ability to Commit an Assault

Felipe contends the evidence does not support his conviction for assault with a firearm because there is no evidence that the revolver was loaded with ammunition that would fire. It goes to the issue of whether Felipe had the present ability to

inflict a violent injury, which is an element of assault.² (§ 240; *People v. Wyatt* (2012) 55 Cal.4th 694, 702.) We review the record in the light most favorable to the judgment and consider the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The testimony of a single witness is sufficient to sustain a conviction unless it is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Detective Williams said that the loaded revolver “appeared to operate like it would be fully functional” but that it was not test-fired. On cross-examination the detective was asked: “If a .32 auto ammunition is inside the cylinder of a revolver and the trigger is pulled, will the gun necessarily fire?” Detective Williams replied “it’s possible” and that “some revolvers are designed to fire automatic rounds with the addition of a clip [¶] So it depends on the make and model of the firearm.” The detective explained that a .32 auto round may not seat properly in the revolver cylinder. “So it’s possible that when the hammer strikes . . . , it may not have enough force to fire.”

In *People v. Ranson* (1974) 40 Cal.App.3d 317, defendant was convicted of pointing a 22-caliber rifle at an officer. The rifle was loaded and operable but the top cartridge was fed into the chamber at an angle, causing the rifle to jam. The Court of Appeal held that the present ability element for an assault was

² The jury was instructed “A necessary element of an assault is that the person committing the assault have the present ability to apply physical force to the person of another. . . . If there is this ability, ‘present ability’ exists even if there is no injury.” (CALJIC No. 9.01.)

satisfied even though the rifle chamber was empty and defendant had to remove the clip, remove the jammed cartridge, reinsert the clip, chamber a round, and pull the trigger to inflict injury. (*Id.* at p. 321; see *People v. Chance* (2008) 44 Cal.4th 1164, 1172-1173 (*Chance*) [discussion of *Ranson* and present ability doctrine].)

Felipe argues that the revolver had to be modified with a clip before it could fire .32 caliber auto ammunition. Detective Williams agreed that some revolvers require a clip to fire auto ammunition but “it depends on the make and model of the firearm.” Detective Williams did not say that Felipe’s revolver required a clip and was shown a photo of the revolver and the five bullets found in the revolver (People’s 18). One bullet was lying on its side. Detective Williams said it appeared to be a .32 caliber auto bullet and that another .32 caliber auto bullet was found in the Ford Explorer glove box. “[I]t was the exact same as the bullets – *three of the five bullets that were recovered from the firearm.*” (Italics added.)

Felipe asserts that he cannot be convicted of assault if the revolver was loaded with the wrong ammunition, which is tantamount to an unloaded gun. (See *People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6 [threat to shoot an unloaded gun is not assault]; *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [firearm not “loaded” unless a shell is in a position from which it can be fired].) The box of mixed ammunition supports the inference that the revolver was loaded with two different kinds of ammunition -- .32 caliber auto and regular .32 caliber bullets. Detective Williams said that “three of the five bullets . . . recovered from the firearm” were .32 caliber auto bullets. The jury reasonably found that the two remaining bullets in the revolver could be fired without a clip. Substantial evidence

supported the finding that Felipe had the present ability to inflict serious injury when he pointed the revolver at the victim. Even if Felipe had to pull the trigger multiple times to cycle the revolver cylinder to the right bullet, it was still an armed assault. That is consistent with the jammed rifle in *Ranson* and consistent with the assault statute which requires “a present ability, to commit a violent injury on the person of another.” (§ 240; *Chance, supra*, 44 Cal.4th at pp. 1172-1173 [present ability even though round not chambered in rifle].) Appellant cites no authority that, in order to convict, the prosecution had to prove that all five bullets in the revolver could be fired without a clip.³

Fernando: Marsden and Faretta Error

Fernando argues that the trial court violated his *Marsden* and *Faretta* rights with “its perfunctory dismissal of [Fernando’s] complaints about his appointed counsel and unequivocal request for self-representation.” At a *Marsden* hearing, Fernando said he was in jail before posting bail and that he and his wife tried to contact his court-appointed attorney, Deputy Public Defender Carol Di Sabatino, but the calls were not returned. When Di Sabatino spoke to him in a video conference, “she [didn’t] want to read the [arrest] report.” Fernando said that he asked Di Sabatino’s supervisor for a copy of “my discovery and police report,” but it was not given to him. In response, Di Sabatino told the trial court that she returned phone calls to Fernando’s

³ We reject Felipe’s ancillary argument that the revolver was not a “loaded firearm” as charged in count 3, unless all five cylinders in the revolver cylinder were loaded with bullets that would fire. The operability of the revolver is not an element of possession of a loaded firearm in a public place. (See *People v. Taylor* (1984) 151 Cal.App.3d 432, 437.)

wife, had video conferences with Fernando, and “read him all of the police reports word for word during [the] video conferences.”

Denying the *Marsden* motion, the trial court found that Di Sabatino was not required to give Fernando copies of the discovery and arrest report. “If you want to come in with [a new] attorney, that’s fine. I don’t have a problem with that.”

We review for abuse of discretion. (*People v. Rodriguez* (2014) 58 Cal.4th 587, 623.) Missing here is any showing that Di Sabatino was not providing adequate representation or that Fernando and counsel were embroiled in an irreconcilable conflict likely to result in ineffective representation. (*People v. Smith* (1993) 6 Cal.4th 684, 696; *People v. Fierro* (1991) 1 Cal.4th 173, 204.) Appellant argues that he was entitled to redacted copies of the police report based on the reciprocal discovery provisions of section 1054, but section 1054 only requires discovery between the prosecution and defense counsel. Di Sabatino’s decision not to provide Fernando copies of the police reports was a reasonable tactical decision and did not constitute an irreconcilable conflict resulting in a complete breakdown of the attorney-client relationship. (*People v. Clark* (2011) 52 Cal.4th 856, 912.) “If a defendant’s claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment, and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law. [Citations.]” (*People v. Jones* (2003) 29 Cal.4th 1229, 1246.)

Faretta

Fernando finally claims that the trial court ignored his *Faretta* request to proceed in pro per. The argument fails

because Fernando did not make a clear and unequivocal request for self-representation. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1087.) “““[T]he right of self-representation is waived unless defendants articulately and unmistakably demand[s] to proceed *pro se*.” [Citations.] . . .’ [Citation.]” (*People v. Stanley* (2006) 39 Cal.4th 913, 932.) In assessing a *Faretta* request, the trial court ““should draw every reasonable inference against waiver of the right to counsel”” (*People v. Valdez* (2004) 32 Cal.4th 73, 98.)

Fernando went to the police station after Di Sabatino’s supervisor refused to provide him copies of the arrest report. “I spoke to the lieutenant and the lieutenant said its by law for her to give it to me or else I file for pro per – pro per?” The “or else I file for pro per” was in to reference to what the police lieutenant said and not a request for self-representation. In *People v. Skaggs* (1996) 44 Cal.App.4th 1 (*Skaggs*), defendant said “I’d like to go pro per if I could.” (*Id.* at p. 5.) The Court of Appeal held it was not an unequivocal *Faretta* request because defendant made the statement at a *Marsden* hearing to substitute counsel. (*Id.* at pp. 6-7.) “The [trial] court repeatedly and consistently referred to the matter before him as a *Marsden* matter and nobody at the hearing disagreed with this characterization” (*Id.* at p. 6.)

Like *Skaggs*, Fernando made a vague reference to “file for pro per” at a *Marsden* hearing on a discovery dispute. “[T]he trial court ha[d] no *sua sponte* duty to inquire about [Fernando’s] intent when his purpose is not immediately clear. [Citation.]” (*Skaggs, supra*, 44 Cal.App.4th at p. 7.) After the trial court denied the *Marsden* motion, appellant agreed to keep Di Sabatino as his trial attorney. Assuming, arguendo, that a *Faretta* request was made, it was abandoned. (*Id.* at pp. 7-8.)

Disposition

The judgments are affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Gary J. Ferrari, Judge

Superior Court County of Los Angeles

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